THE

LAW OF MARRIED WOMEN

IN

MASSACHUSETTS.

BY

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INTRODUCTION.

"Even the disabilities which the wife lies under are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England."—*1 Blackstone's Commentaries, 445.*

* "Nothing, I apprehend, would more conciliate the good-will of the student in favor of the laws of England than the persuasion that they had shown a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve. In addition to what has been observed in this chapter by the learned commentator, I shall here state some of the principal differences in the English law respecting the two sexes; and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth.

"Husband and wife, in the language of the law, are styled *baron* and *feme*. The word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect that if the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron it is regarded by the laws as a much more atrocious crime, as she not only breaks through the re-

* Mr. Christian's note.

straints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason (though in petit treason the punishment of men was only to be drawn and hanged), till the 30 Geo. III. c. 48, the sentence of women was to be drawn and burnt alive.

"By the common law all women were denied the benefit of clergy; and till the 3 & 4 W. and M. c. 9, they received sentence of death, and might have been executed for the first offence in simple larceny, bigamy, manslaughter, &c., however learned they were, merely because their sex precluded the possibility of their taking holy orders; though a man who could read was for the same crime subject only to burning in the hand and a few months' imprisonment.

"These are the principal distinctions in criminal matters. Now let us see how the account stands with regard to civil rights.

"Intestate personal property is equally divided between males and females; but a son, though younger than all his sisters, is heir to the whole of real property.

"A woman's personal property by marriage becomes absolutely her husband's, which, at his death, he may leave entirely away from her; but if he dies without will, she is entitled to one third of his personal property if he has children; if not, to one half.

"By the marriage, the husband is absolutely master of the profits of the wife's lands during the coverture; and if he has had a living child, and survives the wife, he retains the whole of those lands, if they are estates of inheritance, during his life; but the wife is entitled to

dower, or one third, if she survives, out of the husband's estates of inheritance; but this she has whether she has had a child or not.

"But a husband can be tenant by the curtesy of the trust estates of the wife, though the wife cannot be endowed of the trust estates of the husband.

"With regard to the property of women, there is taxation without representation; for they pay taxes without having the liberty of voting for representatives; and, indeed, there seems at present no substantial reason why single women should be denied this privilege. Though the chastity of women is protected from violence, yet a parent can have no reparation by our law from the seducer of his daughter's virtue but by stating that she is his servant, and that by the consequences of the seduction he is deprived of the benefit of her labor; or where the seducer at the same time is a trespasser upon the close or premises of the parent. But when by such forced circumstances the law can take cognizance of the offence, juries disregard the pretended injury, and give damages commensurate to the wounded feelings of a parent.

"Female virtue, by the temporal law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in conversation that the purest maid or chastest matron is the most meretricious and incontinent of women with impunity, or free from the animadversions of the temporal courts. Thus female honor, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator.

"From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favor to the female sex."

The note of Mr. Christian, given above, states in a general way the condition of a married woman at common law. There were many other civil disabilities. The marriage was a merger of her whole legal being with that of her husband, who was responsible for her support, for her torts, and for her crimes. She had no direct control over her property, but could, in some cases, bind that of her husband.

Courts of Equity relieved against many of these disabilities. They allowed married women to hold separate property through the medium of a trustee; in some cases enforced gifts and contracts between husband and wife, and refused to allow their aid to a husband in reducing property of the wife to possession unless he settled a suitable portion on her.

In 1787[1] provision was made by the General Court of Massachusetts for conveyances of real estate and contracts of married women when their husbands had absented themselves from the state.[2] By the Statute of 1842, c. 74, she was allowed to make a will with the consent of

[1] St. 1787, c. 32.

[2] See also St. 1823, c. 146; St. 1833, c. 127; St. 1835, c. 146; R. S. c. 77.

her husband. In 1845[1] the first radical change was made by allowing married women to hold separate property without the intervention of a trustee, and to sue and be sued on contracts made with reference to such property as if sole. In the next year[2] it was provided that payment of wages for their own work might be made to married women, and that their receipt should be a sufficient discharge.

In 1855[3] the property, real and personal, of a married woman before her marriage, and that which came to her after marriage by descent, devise, bequest, or gift of any person except her husband, was made her separate property and not subject to the debts of the husband. She was allowed to sell personal property alone, and real estate and shares in corporations with the consent of her husband. She was allowed to give by will one half of her personal estate, and all her real estate, subject to her husband's life interest by a will made without his consent. She was allowed to carry on trade or business, and sue and be sued in regard to it. In 1857 further provisions to the same general effect were

[1] St. 1845, c. 208.

[2] St. 1846, c. 209.

[3] St. 1855, c. 304.

made.[1] The acts of 1845, 1846, 1855, and 1857 are substantially the provisions contained in the General Statutes of 1860. The last legislation was in 1874,[2] under which the rights of married women to contract, to make promissory notes, or mortgages, to sell real estate, to sue and be sued, are precisely the same as those of her husband, except the difference between her dower and his curtesy, of which neither can bar the other. In 1877, and again in 1878, a bill was passed by the Senate to legalize contracts between husbands and wives, and providing that the wife should own her wardrobe and articles of personal ornament, but it was defeated each year in the House.

[1] St. 1857, c. 249.

[2] St. 1874, c. 184.

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LAW OF MARRIED WOMEN.

CHAPTER I.

MARRIAGE.

WHO MAY MARRY.

All persons subject to the exceptions hereinafter enumerated are capable of binding themselves in marriage who have arrived at the age of consent, which, in this commonwealth, as by the common law, is twelve in females and fourteen in males. A marriage between two infants of or above these ages is valid, even without the consent of the parents or guardians,[1] although the statutes impose a penalty upon any magistrate or minister who performs the ceremony in such case.[2]

WHAT MARRIAGES ARE VOID.

Chapter 106 of the General Statutes provides that no woman shall marry her father, grand-

[1] *Parton* v. *Hervey*, 1 Gray, 119.

[2] Gen. St. c. 106, §§ 13, 18.

father, son, grandson, step-father, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, or mother's brother; and in the cases mentioned in which the relationship is founded on marriage, the prohibition continues, notwithstanding the dissolution of such marriage by death or divorce, unless the divorce is for a cause which shows the marriage to have been originally unlawful or void.

No insane person or idiot is capable of contracting marriage.

No woman having a former husband living (unless she has been divorced from him) can contract another marriage.

Not only are marriages within the degrees of consanguinity mentioned above prohibited, but parties so marrying render themselves liable to imprisonment.[1]

All marriages solemnized within this commonwealth, which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them

[1] Gen. St. c. 165, § 7.

having a former husband or wife then living, or when either party was insane or an idiot, are void without any decree of divorce or other legal process.[1]

If persons resident in this commonwealth, in order to evade the provisions prohibiting marriages on account of consanguinity, affinity, insanity, or idiocy, with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and afterward return and reside here, the marriage will be deemed void in this state.[2]

A form of marriage, entered into by the parties in good faith, and with a full but erroneous belief of the death of the actual husband or wife of either of the parties, is void, although such husband or wife has been absent, and not known to be alive, for seven years;[3] but in such case the party would not be guilty of polygamy.[4]

The belief of the guilty party in a case of divorce that he has a right to marry again in the lifetime of the other party, without leave of

[1] Gen. St. c. 107, § 1.

[2] Gen. St. c. 106, § 6; *Com.* v. *Lane*, 113 Mass. 458.

[3] *Glass* v. *Glass*, 114 Mass. 563.

[4] Gen. St. c. 165, § 5.

court, does not render such marriage valid, and it cannot be made valid by a special act of the legislature, as such act would be unconstitutional.[1]

If the parties to a marriage, solemnized when either of them was under the age of consent, separate during such nonage, and do not afterwards cohabit, the marriage will be void without a decree of divorce or other legal process.[2]

WHAT MARRIAGES ARE VOIDABLE.

Fraud vitiates all contracts, and the contract of marriage is no exception to this rule. A marriage procured by force or fraud will, upon application to the court, be decreed to be null and void; so, if a marriage is supposed to be void, or the validity thereof is doubted for fraud or other cause, either party may file a libel for annulling the same.[3]

So also, when the validity of a marriage is

[1] *White* v. *White*, 105 Mass. 325.

[2] Gen. St. c. 107, § 3.

[3] Ibid. § 4. See *Reynolds* v. *Reynolds*, 3 Allen, 605; *Donovan* v. *Donovan*, 9 Allen, 140; *Foss* v. *Foss*, 12 Allen, 26; *Crehore* v. *Crehore*, 97 Mass. 330.

denied or doubted by either party, the other party may file a libel for affirming the marriage.[1]

HOW MARRIED.

Persons intending to be joined in marriage shall before their marriage cause notice thereof to be entered in the office of the clerk or registrar of the city or town in which they respectively dwell, if within the state. If there is no such clerk or registrar in the place of their residence, the entry shall be made in an adjoining city or town.[2]

If they live without the commonwealth, and intend to be joined in marriage within the commonwealth, this notice of their intention must be entered with the clerk or registrar of the city or town in which they propose to have the marriage solemnized.[3]

The clerk or registrar must thereupon deliver to the parties a certificate specifying all facts in relation to the marriage required by law to be ascertained and recorded, and this certificate shall be delivered to the minister or magis-

[1] Gen. St. c. 107, § 5.

[2] Gen. St. c. 106, § 7.

[3] St. 1867, c. 58, § 1.

trate before he proceeds to solemnize the marriage.[1]

Any person applying for such certificate, who wilfully makes a false statement in relation to the age, residence, parent, master, or guardian of either of the parties intending marriage, shall forfeit a sum not exceeding two hundred dollars.[2]

When a marriage is solemnized in another state between parties living in this state, and they return to dwell here, they must, within seven days after their return, file with the clerk or registrar of the city or town where either of them lived at the time, a certificate or declaration of their marriage, including the facts concerning marriages required by law, and for every neglect they shall forfeit ten dollars.[3]

Marriages may be solemnized by a justice of the peace in the county for which he is appointed when either of the parties resides in the same county, and by a minister of the gospel throughout the state; but all marriages shall be solemnized in the city or town in which the person solemnizing them resides, or in which one or both of the persons to be married reside.[4]

[1] Gen. St. c. 106, § 8.
[2] Ibid. § 11.
[3] Ibid. § 12.
[4] Ibid. § 14.

Marriages among Quakers or Friends may be solemnized in the manner heretofore used and practised in their societies.[1]

No marriage solemnized before a person professing to be a justice of the peace, or minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, by want of jurisdiction or authority in such person, or by an omission or informality in the manner of entering the intention of marriage, if the marriage is in other respects lawful, and is consummated with a full belief, on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.[2]

No peculiar ceremonies are requisite, and no form of words is established, for the solemnization of marriage. The consent of the parties is the great essential, and it is sufficient if they contract in some form or other before a justice of the peace for the county in which either of them resides, or a minister who resides within the state, and he assents to the proceeding, acting in his official capacity.[3]

[1] Gen. St. c. 106, § 15.

[2] Ibid. § 20.

[3] *Milford* v. *Worcester*, 7 Mass. 48.

It has been held that the actual assent of the magistrate or minister is not necessary if the contracting parties really believe that he assents.[1]

In this case the parties went before a justice of the peace, with the intent on the part of both to contract marriage before him. The man simply stated that the woman was his wife, and they then departed and afterward lived together as man and wife, both believing themselves lawfully married. The court held this to be a valid marriage, notwithstanding the justice testified that he did not understand that he married the parties, and that all that was said by either of them was that the man introduced the woman as his wife.

This seems to go to the extreme limit of liberality in the construction of Gen. St. c. 106, § 20, which provides that a marriage is not to be "deemed or adjudged void, nor shall the validity thereof be in any way affected by want of jurisdiction or authority in such person (that is to say, a person professing to be a minister or justice of the peace), or by an omission or informality in the manner of entering the inten-

[1] *Meyers* v. *Pope*, 110 Mass. 314.

tion of marriage, if the marriage is in other respects lawful, and is consummated with a full belief on the part of the person so married, or either of them, that they have been lawfully joined in marriage."

LEGITIMACY OF ISSUE.

The issue of a marriage dissolved by a divorce or sentence of nullity, on account of consanguinity or affinity between the parties, will be deemed to be illegitimate.[1]

The issue of a marriage dissolved on account of the nonage, insanity, or idiocy of either party will be deemed to be the legitimate issue of the parent who was capable of contracting the marriage.[2]

When a marriage is dissolved on account of a prior marriage of either party, and it appears that the second marriage was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead, the issue will be deemed the legitimate issue of the parent capable of contracting the marriage.[3]

[1] Gen. St. c. 107, § 28. [2] Ibid. § 29. [3] Ibid. § 30.

CHAPTER II.

CONTRACTUAL POWERS.

ANTE-NUPTIAL CONTRACTS.

It is provided by statute that at any time before their marriage the parties may enter into a contract in writing, providing that after the marriage the whole or any part of the estate, real or personal, of either, or any right of action of either, shall remain or become the property of the husband or wife according to the terms of the contract.[1] A female minor above the age of eighteen years may join with her guardian in making such a contract, in which case it will have the same effect as if she were of full age.[2] There must be annexed to the contract a schedule containing a clear description of the property to be affected by it, and both contract and schedule must be recorded within ninety days from the marriage, in the Registry of Deeds for the county where the husband lived at the

[1] Gen. St. c. 108, § 27. [2] St. 1869, c. 292.

time of the record, or if he was not a resident within this state, for the county where the wife resided at the time of the record, if it is recorded before marriage, or in which she last resided, if recorded after the marriage, and also in every county or district in which there are lands to which it relates. If not so recorded, it is void, except between the parties to it.[1] But when the contract relates only to the rights which the survivor may claim in the estate of the other after the marriage relation has been ended by death, its validity does not depend on the statute, and it need not be recorded.[2]

The contract must be enforced in equity, where specific performance may be decreed,[3] if it was entered into understandingly,[4] but not in favor of a party whose part of the contract has not been performed.[5] Although it provides that the wife shall make no claim on her husband's estate after his death, it is no bar to a claim in

[1] Gen. St. c. 108, § 28; St. 1867, c. 248.

[2] *Jenkins* v. *Holt*, 109 Mass. 261.

[3] *Miller* v. *Goodwin*, 8 Gray, 542; *Lawrence* v. *Bartlett*, 2 Allen, 36.

[4] *Tarbell* v. *Tarbell*, 10 Allen, 278.

[5] *Sullings* v. *Sullings*, 9 Allen, 234.

the Probate Court for an allowance for necessaries,[1] or for a distributive share of the estate.[2]

POST-NUPTIAL SETTLEMENTS.

As, by the common law, the property of the wife was absolutely vested in the husband by the marriage, of course she could take no legal title from him by a direct gift.[3] And the statutes providing for the holding of separate property by married women expressly provide that nothing in them shall authorize a husband to give or convey property to his wife.[4] But such a gift of personal property, if kept distinct and separate by the wife, and not mixed with his property, so that it cannot be distinguished, will be good after his death against his legal representatives[5] or legatees,[6] but not against

[1] *Blackinton* v. *Blackinton*, 110 Mass. 461.

[2] *Sullings* v. *Richmond*, 5 Allen, 187.

[3] *Thomson* v. *O'Sullivan*, 6 Allen, 303; *Baxter* v. *Knowles*, 12 Allen, 114; *Hawkins* v. *Providence and Worcester R. R.*, 119 Mass. 596.

[4] Gen. Sts. c. 108, § 10.

[5] *Adams* v. *Brackett*, 5 Met. 280; *McCluskey* v. *Prov. Inst. for Savings*, 103 Mass. 300.

[6] *Fisk* v. *Cushman*, 6 Cush. 20.

creditors, and he can reduce it to possession at any time before his death.[1] This rule as to reduction to possession seems to have been broken in upon by a later decision, that a man who has deposited money in a savings bank in the name of his wife cannot maintain an action against the bank for it, after notifying them that it was his.[2] It is difficult to reconcile this decision, either with *Towle* v. *Towle*,[3] or with *Broderick* v. *Waltham Savings Bank*,[4] in which one who deposited in the name of another not his wife was allowed to maintain an action against the bank for the amount of his deposit.

A conveyance of real estate directly from husband to wife is absolutely void at law.[5] But

[1] *Towle* v. *Towle*, 114 Mass. 167; *Fisk* v. *Cushman*, 6 Cush. 20.

[2] *Sweeney* v. *Boston Five Cents Savings Bank*, 116 Mass. 384.

[3] *Supra*.

[4] 109 Mass. 149.

[5] *Thomson* v. *O'Sullivan*, 6 Allen, 303; *Motte* v. *Alger*, 15 Gray, 322. But if the husband, after mortgaging his land, sells his equity, his wife can buy at the mortgagee's sale. *Field* v. *Gooding*, 106 Mass. 310. A wife who buys real estate belonging to her husband at a sheriff's sale takes no title to it. *Stetson* v. *O'Sullivan*, 8 Allen, 321.

the provision in the statute against conveyances from husband to wife[1] does not prevent a conveyance by him to her of either real or personal property, through a third person, which was good at common law,[2] unless he was insolvent at the time of making it,[3] in which case it will be good against creditors of her husband, if it was for a valuable consideration, as, for instance, her releasing dower in another estate.[4] Nor does the statute prevent a husband from making a valid *donatio causa mortis* to his wife, as it would not be construed to render invalid what was before held to be valid.[4] But although a deed of real estate from the husband directly to his wife is void at law, it is possible that a court of equity would uphold it as a good declaration of a trust.[5]

If a woman pays money out of her separate

[1] Gen. St. c. 108, § 10.

[2] *Motte* v. *Alger*, 15 Gray, 322.

[3] *Bullard* v. *Briggs*, 7 Pick. 533; *Peirce* v. *Thompson*, 17 Pick. 391; *Bancroft* v. *Curtis*, 108 Mass. 47.

[4] *Whitney* v. *Wheeler*, 116 Mass. 490; *Lawson* v. *Lawson*, 1 P. Wms. 441.

[5] See 1 Perry on Trusts, § 95; 2 Kent Com. 129, note *c*; *Wallingsford* v. *Allen*, 10 Peters, 583, 594; *Shepard* v. *Shepard*, 7 Johns. Ch. 57; *Coates* v. *Gerlach*, 44 Penn. St. 43.

estate to her husband, it will be deemed, in the absence of proof, to have been given to him with the intention that it should be applied to the use or benefit of either or both of them at his discretion, and she cannot recover it back from his executor.[1] But the husband can return money placed in his keeping by his wife, and the transaction will not be a gift, but, if free from any fraudulent intent, will be good against creditors.[2] If it can be shown that the husband took the money from his wife to hold in trust for her, a court of equity will give her relief.[3]

WHAT PROPERTY IS SOLE.

At common law, by marriage all the personal property of the woman absolutely vested in her husband. All her choses in action might be reduced to possession at any time during the marriage, but if they were not, on the dissolution of the marriage, either by the death of the husband or by a divorce, they remained the

[1] *Jacobs* v. *Hesler*, 113 Mass. 157.

[2] *Snow* v. *Paine*, 114 Mass. 520.

[3] *Walker* v. *Walker*, 9 Wall. 743, 753.

property of the wife.[1] The only way in which she could have any separate estate was through the medium of a trustee. And even now, in the absence of all proof, the presumption is that any goods or money held by the wife belongs to the husband. The enabling statutes do not do more than allow this presumption to be rebutted.[2] But any property of which a woman was possessed before marriage, and any that comes to her by descent, devise, bequest, grant, or gift from any one, except her husband, that which she acquires by her business or labor on her separate account, and that which she receives for releasing dower by a deed subsequent to the conveyance of her husband, and the rents and profits of the same, after marriage, are her separate property, free from the control of her husband, and from liability for his debts.[3] All work and labor done by her for others than her husband and children is, unless there is an express agreement on her part to the contrary, presumed to be on her separate account.[4] If she purchases property with her own means,

[1] *Legg* v. *Legg*, 8 Mass. 99.

[2] *Com.* v. *Williams*, 7 Gray, 337.

[3] Gen. St. c. 108, § 1.

[4] St. 1874, c. 184, § 1.

and upon her own credit exclusively, it becomes her own, and the only question is from whom the consideration proceeds. There is no need of any words in the conveyance of personal property limiting it to her separate use, and probably not in a deed of real estate.[1] But if she mixes her money or other personal property with that of her husband, so that it cannot be separated and ascertained, she thereby loses all control over it.[2] Similarly, if a husband builds a house on land belonging to his wife, it belongs to her, and as they cannot contract with each other, he will not be heard to say there was any agreement by which it was to remain his.[3]

On the other hand, property purchased with the money of the husband, though intended exclusively for the use of the wife, as articles of clothing or personal ornament, belongs wholly to him.[4] But after the death of the husband the apparel and ornaments of the widow and minor children belong to them.[5]

[1] *Spaulding* v. *Day*, 10 Allen, 96.

[2] *McCluskey* v. *Prov. Inst. for Savings*, 103 Mass. 300.

[3] *Webster* v. *Potter*, 105 Mass. 414.

[4] *Hawkins* v. *Prov. & Worcester R. R.*, 119 Mass. 596.

[5] Gen. St. c. 96, § 4.

The husband may be a trustee for his wife. Manual possession by him of her personal property is not necessarily inconsistent with her separate title. Probably he can be charged in trustee process, but only for property in his hands specifically as the separate property of his wife at the time of service of process upon him. The previous receipt of money, under circumstances which would make him liable to any other person for "money had and received," would not alone be sufficient to charge him as trustee for his wife in an action at law, because the relation of debtor and creditor cannot subsist between them. Such a remedy at law, of so limited and uncertain character, is not plain, complete, or adequate, and a bill in equity will lie to charge the husband as trustee.[1]

No person can be adjudged a trustee by reason of any money or credits in his hands, due for the wages of the personal labor or services of the wife or minor children of the defendant in trustee process.[2] Any one who wilfully causes, or aids and abets in causing, such wages to be attached by trustee process, for the pur-

[1] *Robinson* v. *Trofitter*, 109 Mass. 478.

[2] St. 1868, c. 95.

pose of delaying their payment, is liable to a fine not exceeding fifty dollars.[1]

CONTRACTS OF MARRIED WOMEN.

At common law the husband assumed by marriage all the debts of his wife, and his goods or body could be taken on a judgment for her debt contracted before marriage. Any right of action against her was suspended during the coverture, but was revived by the death of her husband. Any contract made by her after marriage was absolutely void at law, though frequently sustained in a court of equity, as a charge upon her separate estate.[2]

By the Gen. St. c. 108, a married woman was made liable on causes of action which arose before the marriage, and her husband was relieved of his liability for them.[3] She was also allowed to make contracts with reference to her separate property, and sue and be sued on them as if sole. If the contract did not relate to her

[1] St. 1878, c. 260, § 2.

[2] See *Willard* v. *Eastham*, 15 Gray, 328; *Rogers* v. *Ward*, 8 Allen, 387.

[3] Gen. St. c. 108, § 8.

separate property it was void. It was held that a woman who signed a bail-bond as surety for her husband was not liable on it.[1] Payment of a note given by a wife for the debt of her husband without any consideration received by her or any benefit to her separate estate, could not be enforced at law,[2] nor in equity, as a charge on her separate estate.[3] But a note given in payment of work done on land owned by a woman and her husband jointly was held to be a contract with reference to her separate property.[4] If work is done on the separate property of a married woman with her knowledge, it is evidence that she agreed to pay for it, but raises no presumption of law that she did so.[5]

By the Statute of 1871, c. 304, a married woman was allowed to make contracts for necessaries to be furnished for herself or family, and to sue and be sued thereon as if sole; but the act provides that this should not exempt the

[1] *Yale* v. *Wheelock*, 109 Mass. 502.

[2] *Athol Machine Co.* v. *Fuller*, 107 Mass. 437; *Williams* v. *Hayward*, 117 Mass. 532.

[3] *Willard* v. *Eastham*, 15 Gray, 328.

[4] *Burr* v. *Swan*, 118 Mass. 588.

[5] *Westgate* v. *Munroe*, 100 Mass. 227.

husband from his common-law liability for the support of his wife and family.

The Statute of 1874, c. 184, removed the restriction as to separate property, and allowed a married woman to sue and be sued on all contracts, except with her husband, as if sole. Under it the rights and liabilities of a wife as to contracts seem to be precisely the same as those of the husband. But it does not make her liable on any contracts made before its passage, which were void when made.[1] Since that statute the wife has been held liable on a joint note by her and her husband, although the consideration for the note was a debt of the husband.[2] But as the husband and wife are incapable of contracting with, or suing each other, no contract of indemnity can be made or implied in such case between them, as there might be in the case of strangers.[3] If a loan is made to a married woman upon her credit, evidence that it was known, or understood, by the plaintiff, that she intended to apply the money to the benefit of the business of her husband is immaterial, and

[1] *Cram* v. *Kelley*, 7 Allen, 250.

[2] *Major* v. *Holmes*, 5 Reporter, 334; 124 Mass.

[3] Ibid.

she is liable.[1] But if the loan is made upon an agreement that it shall be applied to the use or benefit of her husband, or his firm, she is not liable on a note given by her for it prior to the Statute of 1874, c. 184.[2]

CONTRACTS BETWEEN HUSBAND AND WIFE.

The husband and wife can make no valid contracts with each other. This is the doctrine of the common law, and is carefully preserved in all the statutes regarding married women. It is based on public policy, and is for the prevention of domestic infelicity, which might result from suits between husband and wife. The fact that the parties have cohabited as husband and wife does not estop the plaintiff from denying the validity of the marriage.[3]

If the husband borrows money of his wife, promising to repay it, he cannot be forced to do so by an action on the contract, for that has no validity. Nor can he be sued in tort for a conversion of the money.

[1] *Wilder* v. *Richie*, 117 Mass. 382.

[2] *Nourse* v. *Henshaw*, 123 Mass. 96.

[3] *Robbins* v. *Potter*, 98 Mass. 532.

[4] *Bassett* v. *Bassett*, 112 Mass. 99.

A note given by the husband to his wife, or by the wife to her husband, is absolutely void at law, even in the hands of *bona fide* holders.[1] But if the wife makes a note payable to the order of her husband, and he indorses it to a third party, he may possibly be estopped to deny its validity if sued as indorser.[2] It has been held that a wife may be a conduit to pass the title to her husband's note, but some doubt has been thrown on the case, and it is difficult to support it on principle.[3] By the indorsement of the husband to his wife no title vests in her, but it remains in him.[4]

If a note made by either husband or wife before marriage comes into the possession of the other after marriage, it becomes a nullity, and cannot be enforced against the personal representatives after death, nor will it be revived by indorsement to a third party.[5] But if the

[1] *Ingham* v. *White*, 4 Allen, 412; *Turner* v. *Nye*, 7 Allen, 176; *Chapman* v. *Kellogg*, 102 Mass. 246; *Roby* v. *Phelon*, 118 Mass. 541.

[2] *Roby* v. *Phelon*, 118 Mass. 541.

[3] *Slawson* v. *Loring*, 5 Allen, 340. See *Roby* v. *Phelon*, *supra*.

[4] *Gay* v. *Kingsley*, 11 Allen, 345.

[5] *Chapman* v. *Kellogg*, 102 Mass. 246; *Abbott* v. *Winchester*, 105 Mass. 115.

beneficial interest only is vested in the wife, if the legal title has not been transferred to her, the notes may be proved against the estate of the maker in insolvency.[1]

How far a contract between husband and wife will be upheld in equity has not been determined in this commonwealth. In *Turner* v. *Nye*,[2] it was held, on a bill of interpleader, that an administrator could not pay a note given by his intestate to his wife, where there was no consideration for the note, the money advanced by the wife not having been her separate property. Nor could the note be considered a good declaration of trust to hold the husband as trustee for his wife. In *Phillips* v. *Frye*,[3] the husband executed a note and mortgage to a third person as trustee for his wife, there being no consideration for the note. It was held that his administrator could not be allowed in his account for having paid the note, on the ground that a mere meritorious consideration, as a provision for a wife or child, is not recognized by courts of equity as sufficient to require the enforcement of an executory

[1] *Stearns* v. *Bullens*, 8 Allen, 581.

[2] 7 Allen, 176.

[3] 14 Allen, 36.

contract. It has been held in the District Court of the United States for the District of Massachusetts, that a bankrupt's wife, who had advanced her husband money out of her separate property, which was intended as a loan, and not as a gift, could prove against his estate for the amount advanced, on the ground that courts of equity will enforce contracts between husband and wife entered into for good consideration.[1]

It is settled in England that courts of law and equity will enforce covenants of a husband with a trustee for the support of the wife in articles of separation where the separation exists already, or is to be immediate, but not in articles in contemplation of future separation, and this has been recognized and followed in the courts of many of the states of this country.[2] It is still an open question in Massachusetts. In *Page* v. *Trufant*,[3] the action was on a bond, given to the father of the wife by the

[1] *Re Blandin*, 1 Lowell, 543 ; *Re Richards*, April, 1878. See also *Livingston* v. *Livingston*, 2 Johns. Ch. 537 ; *Shepard* v. *Shepard*, 7 Johns. Ch. 57 ; *Robinson* v. *Trofitter*, 109 Mass. 478.

[2] Homer, *arguendo* in *Albee* v. *Wyman*, 10 Gray, 222.

[3] 2 Mass. 159.

husband, for the support of the wife, and it was held the action lay. In *Albee* v. *Wyman*,[1] the question was raised but not passed on, though the court (Dewey, J.) remarked that such a contract was "obnoxious certainly to very grave objections, arising from the relations of the respective parties, and the impolicy of furnishing facilities for a continued separation of those whose solemn obligations and duties have united them as members of one family."

In *Bigelow* v. *Hubbard*,[2] it was held that an agreement of separation between husband and wife and a trustee for the wife, by which it was provided that the husband should pay to the wife a certain sum yearly, which she was to receive in full for all her claims on him, for support during his life, and "all her claims upon his estate after his death," could be waived by the wife, and her dower insisted on in the place of it after his death.

SEPARATE BUSINESS.

A married woman may carry on any trade or business on her sole and separate account.[3] But

[1] 10 Gray, 222.
[2] 97 Mass. 195.
[3] Gen. St. c. 108, § 3.

she must file in the clerk's office of the city or town where she does or proposes to do business, a certificate setting forth the name of her husband, the nature of the business proposed to be done, and the place where it is to be done, giving the street and number, if practicable; and whenever the place of business or the nature of the business is changed, a new certificate must be filed accordingly.[1] If the woman does not file this certificate, her husband may file one containing a similar description of the business.[2] If no certificate is filed, the wife will not be allowed to claim any property employed in such business against creditors of her husband, and her husband will be liable upon all contracts lawfully made in the prosecution of such business, in the same manner and to the same extent as if made by himself.[3] Even if exclusive credit was given to the wife, the husband is liable if the certificate has not been filed.[4] The certificate will not be invalidated by not containing a recital of the property to be protected by it, or by an incorrect statement in regard to it. Nor

[1] St. 1862, c. 198, § 1.

[2] Ibid. § 2.

[3] Ibid.

[4] *Feran* v. *Rudolphsen*, 106 Mass. 471.

will the fact that there was an intermingling of the property of husband and wife defeat the protection afforded.[1]

The certificate is intended to protect the property of the wife, and will not protect that of the husband from attachment by his creditors.[2] It is a question of fact whether the goods belong to the husband, and the facts that the lease is taken in the husband's name, that the signs at the shop door are also in his name, and that notes given in payment of goods at the shop are signed by him, are not conclusive evidence that the goods are his, if the certificate has been duly filed.[3]

The object of the Statute of 1862, requiring the certificate to be filed, was to afford the means of ascertaining in which of two persons, apparently in the possession and use of property in carrying on any kind of trade or occupation, the title is vested, so that all having occasion to transact business with either may regulate their dealings accordingly. Keeping a boarding-house[4] or a private school[5] is carrying on

[1] *Long* v. *Drew*, 114 Mass. 77.

[2] *Mason* v. *Bowles*, 117 Mass. 86.

[3] Ibid.

[4] *Chapman* v. *Briggs*, 11 Allen, 546.

[5] *Feran* v. *Rudolphsen*, 106 Mass. 471.

such a business that a certificate must be filed to protect the property of the wife, or relieve the husband from liability for her contracts. But keeping a colt for use, or buying materials with which to build a house, is not a separate business under the statute.[1]

The nature of the business need not be described with great particularity, but it is sufficient if the description is such as to make it intelligible to the jury what the business is. A certificate of "the general business of saloon-keeper" is not in law insufficient.[2] If property is contained in more than one building, both must be described in the certificate, as only that contained in the building named is protected.[3] The statute applies to personal property only.[4]

The neglect of a married woman to file the certificate required by the statute gives her husband no authority to sell or mortgage her property. But she may ratify a mortgage which her husband has previously made.[5]

[1] *Proper* v. *Cobb*, 104 Mass. 589.

[2] *Cahill* v. *Campbell*, 105 Mass. 40.

[3] *Harriman* v. *Gray*, 108 Mass. 229.

[4] *Bancroft* v. *Curtis*, 108 Mass. 47.

[5] *Merrill* v. *Parker*, 112 Mass. 250.

PARTNERSHIP.

A married woman cannot be a partner in the same firm with her husband,[1] nor can she sustain an action against partners of whom her husband is one, to recover for services performed for them, as this would be giving effect to a contract between husband and wife.[2] She may belong to a partnership, and be bound by a promissory note given in the partnership name, if her husband is not a member of the same firm,[3] but if her husband is a partner, she cannot be liable on a note in the name of the firm.[4] And she will not be estopped to deny that she is a member of the firm by any statements she may have made in regard to it,[5] unless possibly if a wilful intent is shown to induce the party to act on the faith of the alleged statement. Between 1863 and 1874 she was not allowed to be a co-partner with any one.[6]

[1] *Lord* v. *Parker*, 3 Allen, 127.

[2] *Edwards* v. *Stevens*, 3 Allen, 315.

[3] *Plumer* v. *Lord*, 5 Allen, 460.

[4] *Plumer* v. *Lord*, 7 Allen, 481.

[5] *Plumer* v. *Lord*, 9 Allen, 455.

[6] St. 1863, c. 165; St. 1874, c. 184.

MARRIED WOMEN COMING FROM OTHER STATES, OR ABANDONED BY THEIR HUSBANDS.

It is provided by the General Statutes[1] that married women coming from other states, or abandoned by their husbands, who have left the state, may contract and sue and be sued as if sole. These provisions are superseded by the Statute of 1874, c. 184, which gives the same powers to all married women.

AGENCY.

If a person sells goods to a woman who is living with her husband, he can hold the husband liable for them, either by proof that he, expressly or impliedly, authorized the purchase, or by proof that he refused or neglected to provide a suitable support for the wife, and that the goods sold were necessaries.[2] In the latter case the burden of proof is upon the plaintiff to show that the husband refused or neglected to supply the wife with what was necessary for

[1] Gen. St. c. 108, §§ 29, 31 – 35.

[2] *Raynes* v. *Bennett*, 114 Mass. 424.

decency or comfort in his condition of life, and that the goods sold were such as the reasonable necessities of the wife required her to have.[1] This rests on the ground that the wife has an implied authority, derived from the legal duty of the husband to make suitable provision for her and her children, to act as his agent and procure such supplies as might be necessary on his credit.[2]

It is the province of the court to determine whether the articles sued for are within the class of necessaries, and if so it is the proper duty of the jury to pass upon the questions of the quantity, quality, and their adaptation to the condition and wants of the wife.[3] Thus the court will say as a matter of law that a stock of goods sold for purposes of trade, or materials for building a house, or other articles not required or appropriate for her comfortable support, would not be necessaries.[4] But whether articles of jewelry,[5] a sewing-machine,[6] household furni-

[1] *Eames* v. *Sweetser*, 101 Mass. 78.

[2] *Hall* v. *Weir*, 1 Allen, 261.

[3] *Merriam* v. *Cunningham*, 11 Cush. 40.

[4] *Raynes* v. *Bennett*, 114 Mass. 424.

[5] Ibid.

[6] *Willey* v. *Beach*, 115 Mass. 559.

ture, and the like, are necessaries, is for the jury. As a general rule, the term "necessaries," applied to a wife, is not confined to articles of food or clothing required to sustain life or preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband.[1]

If the husband unjustifiably leaves his wife [2] or if she leaves him with his consent, or justifiably, as because of cruelty and from reasonable apprehension for her safety, as long as she continues her marital purity she carries the credit of her husband with her for necessaries, and he to whom it is pledged by her for that purpose may avail himself of his liability.[3] If the wife is abandoned, she must be considered as the agent of the husband to exercise the usual and ordinary care over the affairs of the household, and to contract for the services of the children for short periods, and to apply their earnings to her and their support. And such agency author-

[1] *Manby* v. *Scott*, 2 Sm. Lead. Cas. 245.

[2] *Hall* v. *Weir*, 1 Allen, 261.

[3] *Reynolds* v. *Sweetser*, 15 Gray, 78; *Burlen* v. *Shannon*, 14 Gray, 433; *Mayhew* v. *Thayer*, 8 Gray, 172.

izes the wife to assign the earnings of the children for the support of the family.[1]

Adultery on the part of the wife discharges the husband, but where a husband by false representations led his wife to believe him dead, and she married again, it was held that he was estopped to set up her bigamy in defence to an action against him for necessaries.[2]

The husband, when the wife has left him because of cruelty, is liable for her funeral expenses.[3]

A husband was not by the common law obliged to support the children of his wife by a former marriage,[4] and this is still in force in Massachusetts, there being no statute on the subject. But though the husband is not obliged to take the children into his family, yet if he does so, he stands *in loco parentis* in respect to them, and in the absence of an express contract, or of circumstances showing a different arrangement, he has a right to their services, and is liable for their support and education.[5]

[1] *Camerlin* v. *Palmer Co.*, 10 Allen, 539.

[2] *Cartwright* v. *Bate*, 1 Allen, 514.

[3] *Cunningham* v. *Reardon*, 98 Mass. 538.

[4] *Worcester* v. *Marchant*, 14 Pick. 510.

[5] *Mulhern* v. *McDavitt*, 16 Gray, 404.

The wife has no implied authority to bind her husband in other ways than have been indicated. Thus, in the absence of evidence that he authorized her, she cannot make a payment which will take her husband's promissory note out of the Statute of Limitations.[1] And her admissions are not competent in evidence to bind him as to a right of way, for she could not make a valid grant of the way, or one which would estop herself or her heirs. And "to say that one may by acts in the country, by admission, by concealment or silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." [2]

The husband may act as the agent of the wife, but his authority must be shown.[3] She is under no obligation to support him, however large her separate property may be. If they own a vessel together, of which he is master, his

[1] *Butler* v. *Price*, 110 Mass. 97 ; S. C. 115 Mass. 578.

[2] *McGregor* v. *Wait*, 10 Gray, 72.

[3] *Merrick* v. *Plumley*, 99 Mass. 566 ; *Paine* v. *Farr*, 118 Mass. 74.

contracts within the ordinary scope of his duty as master will bind her. In such case they are not partners, but joint owners.[1]

[1] *Reiman* v. *Hamilton,* 111 Mass. 245.

CHAPTER III.

CONVEYANCES OF REAL ESTATE.

REAL property owned by a married woman, or of which her husband was seized in her right, could formerly, by the common law of Massachusetts, be conveyed by their joint deed,[1] and that is, perhaps, the most common way of conveying it now, and one which is expressly authorized by the General Statutes.[2] By the Statute of 1855, c. 304,[3] a married woman was allowed to convey her real estate and shares in corporations by her own deed, with her husband's consent in writing, or with the consent of one of the judges of the Supreme Judicial Court, Superior Court, or Probate Court. By the Statute of 1874, c. 184, she was allowed to convey shares in corporations absolutely, and real estate, subject only to her husband's curtesy, i. e. life estate, by her own deed without his consent. Under the provision in the General Statutes, allowing

[1] *Durant* v. *Ritchie*, 4 Mason, 45.

[2] Gen. St. c. 108, § 2.

[3] Gen. St. c. 108, § 3.

her to make contracts in reference to her separate property, she could make a valid executory contract for the purchase of real estate.[1]

Before the Statute of 1874, if the husband did not assent in writing to the conveyance, it was void, either of shares in corporations,[2] or of real estate,[3] and she is not estopped to set up her title either at law[4] or in equity,[5] even if she has fraudulently executed a deed bearing date previous to her marriage.[6] A deed by a man and his wife of her land, made when he was insane, was void.[7] If the husband signs merely "in token of release of all right to dower and homestead," he has sufficiently assented.[8] He sufficiently assents to a mortgage by signing as guarantor her note for the debt, secured by the mortgage, or by signing as attesting witness.[9]

[1] *Faucett* v. *Currier*, 109 Mass. 79.

[2] *Merriam* v. *B. C. & F. R. R.*, 117 Mass. 241.

[3] *Lowell* v. *Daniels*, 2 Gray, 161; *Warner* v. *Crouch*, 14 Allen, 163.

[4] *Lowell* v. *Daniels*, *supra*; *Wight* v. *Shaw*, 5 Cush. 56.

[5] *Merriam* v. *B. C. & F. R. R.*, *supra*.

[6] *Lowell* v. *Daniels*, *supra*.

[7] *Leggate* v. *Clark*, 111 Mass. 308.

[8] *Hills* v. *Bearse*, 9 Allen, 403.

[9] *Cormerais* v. *Wesselhoeft*, 114 Mass. 550; *Child* v. *Sampson*, 117 Mass. 62.

Where the assent of the husband was oral, the Court of Equity refused to compel the wife, after the death of the husband, to execute a new deed.[1] But the wife could convey by deed under a power-of-sale mortgage without her husband's consent.[2] Under the Statute of 1874, the husband's assent is not necessary to the validity of a deed, but without such assent it will not defeat his life interest after the death of his wife.

A husband cannot convey his own real estate so as to defeat his wife's right to dower, unless she expressly releases dower, which she may do in the original conveyance, or by a subsequent release under seal. If she merely signs the deed, and her name does not appear anywhere in the body of it, it will not pass any interest of hers, even her dower.[3] If she joins in the dower clause, only signing "in token of release of dower and of free consent hereto," it carries no interest of hers except her dower.[4] If she joins in the granting part, although the last clause

[1] *Townsley* v. *Chapin*, 12 Allen, 476.

[2] *Cranston* v. *Crane*, 97 Mass. 459.

[3] *Melvin* v. *Proprietors, &c.*, 16 Pick. 137 ; *Wales* v. *Coffin*, 13 Allen, 213.

[4] *Wales* v. *Coffin*, 13 Allen, 213.

states that she signs in release of dower, all her interest passes.[1] If the wife releases dower in a deed, and suffers it to be delivered to the grantee, she cannot afterwards avoid it, on the ground that her signature was obtained by fraud or undue influence on the part of her husband, without showing complicity on the part of the grantee.[2]

The husband of an insane woman may, on petition to the Probate Court, have a trustee appointed to release her dower or homestead rights. The court may, in its discretion, direct the trustee to retain a limited part of the proceeds, to be held to the use of the husband during his life, and for the wife if she survives him.[3]

A deed from a third person to a woman at the request of her husband, who pays the consideration, will be presumed to be a provision for her, and will not create a resulting trust in his favor without clear proof that such was the intention.[4] And no improvements made by him

[1] *Perkins* v. *Richardson*, 11 Allen, 538.

[2] *White* v. *Graves*, 107 Mass. 325.

[3] Gen. St. c. 108, §§ 19 – 22.

[4] *Cairns* v. *Colburn*, 104 Mass. 274; *Edgerly* v. *Edgerly*, 112 Mass. 175; *Cormerais* v. *Wesselhoeft*, 114 Mass. 550.

give him any lien or claim upon the land.[1] Even if the deed be taken in the wife's name, with the intent to defraud creditors, if the wife pays any part of the purchase-money, there is no resulting trust, and his creditors cannot take it without proof that she was a party to the fraud.[2] Where land was conveyed to a man by a deed which recited that half the consideration was paid by his wife, and it was shown that it was the intention to have it conveyed to both, but that her name was omitted by mistake, there was held to be a resulting trust in her favor for half the estate.[3]

A deed or devise of real estate to husband and wife does not give them an estate as tenants in common, or as simple joint tenants, but by entireties. They hold it together during their joint lives, and the husband has a right to all the rents and profits at common law, and probably under the statutes also, and the survivor takes the whole. Neither can defeat the other's right to survivorship.[4] If both husband

[1] *Libby* v. *Chase*, 117 Mass. 105.

[2] *Snow* v. *Paine*, 114 Mass. 520.

[3] *Hayward* v. *Cain*, 110 Mass. 273; *Bancroft* v. *Curtis*, 108 Mass. 47.

[4] *Wales* v. *Coffin*, 13 Allen, 213.

and wife believe that they have each an undivided half, and the husband makes a deed purporting to convey his half, in which the wife releases dower, her right to the whole estate after his death remains unaffected.[1] But if land is conveyed to a man and woman before marriage, though expressed in the deed to be in consideration of one dollar, and a marriage to be consummated between them, they take as tenants in common, or, if the deed clearly intends so, as joint tenants, but not by entireties.[2]

MORTGAGES.

Before the Statute of 1874, which enabled married women to make contracts which did not concern their separate property, a mortgage of a married woman, given to secure payment of a note made by her, without any consideration to her, could not be enforced at law, but could in equity.[3] Before that it was held that if a wife made a mortgage of her separate estate to secure payment of her husband's debt, whether

[1] *Pierce* v. *Chace*, 108 Mass. 254.

[2] *Walsh* v. *Young*, 110 Mass. 396.

[3] *Heburn* v. *Warner*, 112 Mass. 271.

she joined with him in the mortgage note or not, the mortgage could be enforced at law, for there was a valid note.[1] The court reason on the supposition that the mortgage is given to secure the payment of the note, and not of the debt, and that it is not sufficient that there be a valid debt, if there is not a valid note,[2] but that it can be enforced in equity as made an express charge on her separate estate.[3] Since the Act of 1874 a married woman's mortgage rests on the same footing as that of a man, and the only question is whether there is a valid subsisting debt which it is to secure, or perhaps, under *Heburn* v. *Warner*, a valid note.

If a wife holds a mortgage, and her husband afterwards comes into possession of the equity, or *vice versa*, the mortgage is not extinguished, but cannot be enforced during the coverture, as this would necessitate a suit between husband and wife, which the law does not allow.[4] So, if the maker of a valid mortgage marries the mort-

[1] *Bartlett* v. *Bartlett*, 4 Allen, 440.

[2] For an able criticism of *Heburn* v. *Warner*, see 10 Am. Law Rev. 371.

[3] See *Willard* v. *Eastham*, 15 Gray, 328.

[4] *Tucker* v. *Fenno*, 110 Mass. 311.

gagee, the mortgage is not extinguished, but is suspended during the coverture.[1]

A widow who has joined with her husband in a mortgage of her estate, to secure his debt, which she has paid after his death, may prove the claim before commissioners of insolvency upon his estate, and a creditor who holds the wife's mortgage in such case can prove without giving up his security.[2]

If a man, at the time of taking a conveyance of real estate, mortgages it back to secure the whole or any part of the purchase-money, it has always been held that he had no such seisin as to give his wife a right to dower against the mortgagee. In the case of a similar mortgage by the wife, it was held that her seisin was sufficient to give her husband curtesy,[3] but by the Statute of 1874, c. 184, § 2, he has none against the mortgagee. It seems that under the Statute of 1877, c. 83, he will have a life interest in one half of such land against the mortgagee, though this was probably not the intention of the act.

[1] *Bemis* v. *Call*, 10 Allen, 512; *Model, &c. Ass.* v. *Boston*, 114 Mass. 133.

[2] *Savage* v. *Winchester*, 15 Gray, 453.

[3] *Weed Sewing Machine Co.* v. *Emerson*, 115 Mass. 554.

CHAPTER IV.

CRIMINAL LIABILITY. — TORTS. — ARREST.

CRIMINAL LIABILITY.

If a wife commits a criminal act in the presence of her husband, she is presumed to have acted, not of her own will, but under his coercion, and she will not be liable for it, but he will.[1] But she can be convicted by a rebuttal of this presumption, showing that she was not coerced.[2] There is no presumption of coercion if the criminal act is committed in the absence

[1] *Com.* v. *Burk*, 11 Gray, 437; *Com.* v. *Gannon*, 97 Mass. 547. This exemption of the wife seems to extend at common law to all crimes except treason, murder, and perhaps robbery. Some text-writers do not even except these. 1 Bish. Cr. Law, § 357 et seq.; 1 Whart. Cr. Law, § 71; 4 Bl. Com. 28. A married woman is not excused for some misdemeanors, though done in her husband's presence, such as keeping a brothel, or uttering counterfeit money. 4 Bl. Com. 29; Washb. Cr. Law, 22; *Com.* v. *Cheney*, 114 Mass. 281.

[2] *Com.* v. *Eagan*, 103 Mass. 71.

of the husband, and the wife can be indicted alone,[1] though she acts by his order or direction,[2] or jointly with her husband.[3] But if the husband was near enough for the wife to act under his immediate influence and control, though not in the same room, he was not absent within the meaning of the law.[4]

If a married woman illegally keeps intoxicating liquors for sale, her husband will be liable if he has knowledge of the fact and of her intent, if the circumstances are such that she could be considered his agent, as by his living in the same house, and if he does not use reasonable means to prevent her, although he has no interest in the stock in trade or the profits, and although she is carrying on business on her own account, having filed the certificate required by St. 1862, c. 168.[5]

[1] *Com.* v. *Murphy*, 2 Gray, 510 ; *Com.* v. *Butler*, 1 Allen, 4.

[2] *Com.* v. *Feeney*, 13 Allen, 560 ; *Com.* v. *Whalen*, 16 Gray, 25.

[3] *Com.* v. *Tryon*, 99 Mass. 442.

[4] *Com.* v. *Munsey*, 112 Mass. 287 ; *Com.* v. *Burk*, 11 Gray, 437.

[5] *Com.* v. *Kennedy*, 119 Mass. 211 ; *Com.* v. *Barry*, 115 Mass. 146 ; *Com.* v. *Reynolds*, 114 Mass. 306 ; *Com.* v. *Carroll*, 5 Reporter, 699 ; 124 Mass.

The conviction of a man is no bar to the conviction of his wife for a like offence during the same time in the same tenement.[1]

A wife cannot be an accessory after the fact to her husband's crime.[2]

A woman is liable for criminally burning property, although it belonged to her husband.[3]

TORTS.

The Statute of 1871, c. 312, provides that any married woman may sue and be sued in actions of tort, as if she were sole, and that her husband shall not be liable to pay the judgment against her in any such suit.

Under this statute the wife alone is liable, unless aided, abetted, advised, or otherwise encouraged by her husband.[4] But a husband and wife may be jointly sued and charged for a tort done by both of them, if she does not act by his coercion.[5]

The statute is superseded by St. 1874, c. 184.

[1] *Com.* v. *Heffron*, 102 Mass. 148.

[2] Gen. St. c. 168, § 6.

[3] Gen. St. c. 161, § 6.

[4] *Austin* v. *Cox*, 118 Mass. 58; *McCarty* v. *DeBest*, 120 Mass. 89.

[5] *Handy* v. *Foley*, 121 Mass. 259.

ARREST ON CIVIL PROCESS.

A woman cannot be arrested on civil process except for a tort.[1] If a female judgment debtor fails to satisfy an execution for more than twenty dollars, she can be cited before the Probate Court, and compelled to answer under oath as to her possessions. If any goods are disclosed the magistrate can order her to deliver them up, and in case of refusal commit her for contempt. If she parts with any property, or makes any payment of money, after service of the citation, with intent to prevent the same being paid to the judgment creditor, the court may, in its discretion, commit her for contempt.[2]

[1] Gen. St. c. 124, § 7.

[2] St. 1862, c. 162.

CHAPTER V.

DIVORCE.

A DIVORCE may be granted by the Supreme Judicial Court for any of the causes allowed by law, in any case in which the parties were inhabitants of this state at the time of the marriage, upon the petition of either of such parties who has been an inhabitant of this state for three years next preceding the date of the petition.[1]

When the libellant has resided in this state five consecutive years next preceding the time of filing the libel, a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or elsewhere; unless it appears that the libellant has removed into this state for the purpose of procuring a divorce.[2]

With these exceptions, no divorce will be decreed for any cause, if the parties have never

[1] St. 1877, c. 174, § 1.

[2] Gen. St. c. 107, § 11.

lived together as husband and wife in this state; nor for any cause occurring in any other state or country, unless before such cause occurred the parties had lived together as husband and wife in this state, and one of them lived in this state when the cause occurred.[1]

It is sufficient under this section if the parties have both had their actual domicile in this state, although there has been no matrimonial cohabitation or intercourse.[2] The words "to live" and "to reside" are synonymous, and the requirement of living in this state when the cause of divorce occurred is satisfied if the legal domicile of the party at that time remained within its jurisdiction. A domicile once existing cannot be lost by mere abandonment, but continues until a new one is gained. If the domicile continues, the fact that the cause occurred out of the state is of no consequence.[3] The wife cannot acquire a domicile different from that of her husband; and although they live apart she still follows his domicile. The only exception to this rule is that an innocent wife

[1] Gen. St. c. 107, § 12.

[2] *Eaton* v. *Eaton*, 122 Mass. 276.

[3] *Shaw* v. *Shaw*, 98 Mass. 158.

may under some circumstances have a separate domicile for the purpose of sustaining a libel against a guilty husband.[1]

The libel must be brought in the county in which the parties, or one of them, live.[2]

The following are the causes of divorce from the bonds of matrimony in this commonwealth:

1st. Adultery.[3]

A divorce will not be granted for adultery committed with the consent or connivance of the libellant.[4]

In *Broadstreet* v. *Broadstreet*,[5] the insanity of the libellee at the time the offence was committed was held sufficient ground for dismissing the libel. In *Mansfield* v. *Mansfield*,[6] the husband was defaulted, but on a suggestion that *since* the fact alleged he had become insane, the case was continued for a guardian to be appointed.[7]

[1] *Burlen* v. *Shannon*, 115 Mass. 438; *Hood* v. *Hood*, 110 Mass. 463. See *Harteau* v. *Harteau*, 14 Pick. 181.

[2] Gen. St. c. 107, § 13.

[3] Ibid. § 6.

[4] *Cairns* v. *Cairns*, 109 Mass. 408.

[5] 7 Mass. 474.

[6] 13 Mass. 412.

[7] See also on adultery *Clapp* v. *Clapp*, 97 Mass. 531; *Reemie* v. *Reemie*, 4 Mass. 586.

2d. Impotency of either party.[1]

3d. When either party has separated from the other without his or her consent, and united with a religious sect or society that professes to believe the relation of husband and wife void or unlawful, and has continued united with such sect or society three years, refusing during that time to cohabit with the other party, who has not united with such sect or society.[2]

4th. When either party is sentenced to confinement to hard labor in the state prison, or in any jail or house of correction, for the term of life, or for five years or more; and no pardon granted, after a divorce for that cause, to the party so sentenced, will restore such party to his or her conjugal rights.[3]

5th. Extreme cruelty.[4] The cruelty must appear to be such as to cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger.[5]

[1] Gen. St. c. 107, § 6.

[2] Ibid.

[3] Ibid.

[4] St. 1870, c. 404, § 2.

[5] *Cowles* v. *Cowles*, 112 Mass. 298; *Bailey* v. *Bailey*, 97 Mass. 373.

6th. Cruel and abusive treatment.[1]

7th. Gross and confirmed habits of intoxication.[2]

8th. Desertion, continuing for at least three consecutive years next prior to the filing of the libel for divorce,[3] *provided* that when the libel is filed by the party deserting, it appears that the desertion was caused by extreme cruelty of the other party, or that the desertion by the wife was caused by the gross or wanton and cruel neglect of the husband to provide suitable maintenance for her, he being of sufficient ability to do so.[4]

Under the General Statutes the desertion must have continued for five consecutive years. The provision in the St. of 1873 is negative, but seems clearly to supersede the General Statutes.

When the separation is by mutual consent, neither party can obtain a divorce on the ground of desertion. But the voluntary withdrawal of the wife, induced by cruelty or neglect of the husband, is not such consent as would deprive her of the right to a divorce, even if the husband should accompany his cruelty or

[1] St. 1870, c. 404, § 2.
[2] Ibid.; St. 1873, c. 371, § 6.
[3] St. 1873, c. 371, § 2.
[4] Gen. St. c. 107, § 7.

neglect with his permission for her to depart from his house and society.[1] If she is justified by his ill-treatment or misconduct in leaving the house, he cannot have a divorce for the desertion.[2]

The mere refusal of matrimonial intercourse is not enough to constitute desertion, but there must be an abnegation of all the duties and obligations resulting from the marriage contract. Where the wife occupied a different room from her husband, and refused to cohabit with him, his libel was dismissed.[3] But the libel of the wife will not be dismissed merely on the ground that she has received support from her husband during the separation.[4]

The libel will not be defeated by a temporary return or other act done by the party deserting with the intent to defeat the libel, if it appears that such return or other act was not made or done in good faith.[5]

[1] *Lea* v. *Lea*, 8 Allen, 418; S. C. 99 Mass. 493.

[2] *Lyster* v. *Lyster*, 111 Mass. 327; see *Fera* v. *Fera*, 98 Mass. 155.

[3] *Southwick* v. *Southwick*, 97 Mass. 327.

[4] *Magrath* v. *Magrath*, 103 Mass. 577.

[5] Gen. St. c. 107, § 8. See also on desertion *Hall* v. *Hall*, 4 Allen, 39; *Thurston* v. *Thurston*, 99 Mass. 39.

9th. On the libel of the wife, when the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide a suitable maintenance for her.[1]

The neglect to provide must be gross, wanton, *and* cruel. The cruelty must appear to be at least such as shall cause injury to life, limb, or health, or create danger of such injury, or a reasonable apprehension of such danger. The mere neglect to provide for the wife is not enough for her to maintain a libel.[2]

RECRIMINATION.

A party seeking a divorce must come into court with clean hands; and the fact that the complainant in a divorce suit has himself broken, either completely or in part, the same matrimonial chain of whose breach by the other party, whether in the same or in any other of its links, he complains, will constitute a good defence to a libel for divorce. This is called Recrimination.[3]

[1] St. 1870, c. 404, § 2.

[2] *Peabody* v. *Peabody*, 104 Mass. 195; *Holt* v. *Holt*, 117 Mass. 202.

[3] In *Eldred* v. *Eldred*, 2 Curteis, 376, and *Dillon* v. *Dillon*, 3 Curteis, 86, it was held that the wife could not set up a charge

CONDONATION.

Condonation may be either express, that is, signified by words or writing, or it may be implied from the acts of the injured party, and any condonation is on condition, implied if not expressed, that the injury shall not be repeated, and upon breach of the condition the remedy for the original offence is revived.

Any condonation by the wife of her husband's cruelty is on the condition of his treating her in the future with conjugal kindness, and any breach of this condition will revive the right to maintain a libel for the original offence;[1] and such a breach may be shown by acts and words which would not of themselves prove a cause for divorce. Harshness or rudeness, not sufficient to maintain a libel, may receive a different interpretation and effect upon the question of condonation, after proof that the husband had previously gone to the length of positive acts of cruelty.[2]

of cruelty in bar of her husband's remedy of divorce for adultery; nor will malicious desertion be a bar, said Dr. Lushington, *ubi supra*. 2 Kent's Com. (12th Ed.) *100, note *c*.

[1] *French* v. *French*, 14 Gray, 186; *Gardner* v. *Gardner*, 2 Gray, 434.

[2] *Robbins* v. *Robbins*, 100 Mass. 150.

Condonation is always implied from cohabitation after the commission of the offence, after the complainant has knowledge of the fact or believes it on reasonable grounds. The presumption of remission of the offence may, however, be rebutted by evidence, especially in favor of the wife.

Condonation is not so easily to be inferred against the wife as it might be against the husband. The state of the respective parties differs materially in their opportunities for at once withdrawing from the scene of discord and violence. Forbearance for a season may be not only a justifiable, but a necessary step on the part of the wife ; and when shown to have been so, no condonation for acts of extreme cruelty is to be inferred from such cohabitation.[1]

When a wife dismisses a libel for divorce, and agrees to condone the husband's previous offences if he will not commit further acts of adultery, and he does afterward commit adultery, such dismissal, agreement, and condonation will not bar the wife from suing for a divorce for either his earlier or later acts of adultery.[2]

[1] *Gardner* v. *Gardner*, 2 Gray, 434.

[2] *Sewall* v. *Sewall*, 122 Mass. 156.

Forgiveness of one act is not forgiveness of other acts, of which the forgiving party had neither knowledge nor a reasonable ground of belief; nor does readiness to forgive a single offence imply willingness to forgive a life of profligacy. Whether the condonation is in any given case to be confined to one or more acts, or is to include all past offences, is a question to be decided by the language and conduct of the parties, in view of the facts then known or reasonably suspected by the forgiving party.[1]

If a husband, believing upon reasonable grounds the guilt of his wife, still continues to cohabit with her, he will be presumed to have remitted the crime, and will not be allowed a decree of divorce for that cause.[2]

DECREE.

Under the Statutes of Massachusetts a decree of divorce may be either a decree *nisi* (unless) or a decree absolute. In the former case the marriage is not absolutely dissolved, but the decree may be made absolute on motion of the party in whose favor it was rendered, after

[1] *Rogers* v. *Rogers*, 122 Mass. 423.

[2] *Anonymous*, 6 Mass. 147.

the expiration of not less than six months, provided the terms of the decree have been complied with, *unless* sufficient cause to the contrary shall appear.[1]

A decree *nisi* is now granted only when personal service has not been made on the libellee, and when the libel for divorce has been entered at the term during which the decree is granted.[2]

After a decree *nisi* the libellant cannot marry again until the divorce is made absolute, and in a case where the libellant, believing, after a decree *nisi*, that he had obtained a divorce, and was at liberty to do so, married again, the court held the second marriage to be illegal and void, and that the libellant was not entitled to have the decree of divorce made absolute.[3]

The court, upon granting to a woman a divorce from the bonds of matrimony, may allow her to resume her maiden name, or the name of any former husband.[4]

[1] St. 1867, c. 222, § 1. See also St. 1873, c. 371, §§ 2, 3; St. 1874, c. 397, § 1; St. 1875, c. 226, § 1.

[2] St. 1874, c. 397.

[3] *Moors* v. *Moors*, 121 Mass. 232.

[4] Gen. St. c. 107, § 23.

FOREIGN DIVORCES.

When an inhabitant of this state goes into another state or country to obtain a divorce for any cause which occurred while the parties resided here, or for any cause which would not authorize a divorce by the laws of this state, a divorce so obtained will be of no force in this state.[1] In all other cases a divorce decreed in any other state or country, according to the laws thereof, by a court having jurisdiction of the cause and of both the parties, will be valid and effectual in this state.[2]

When a husband goes into another state, without acquiring a domicile there, for the purpose of obtaining, and does fraudulently obtain, a divorce for a cause which occurred in, but was not a cause for divorce by the laws of, this state, a court of that state has no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in this commonwealth.[3]

[1] Gen. St. c. 107, § 54. See *Lyon* v. *Lyon*, 2 Gray, 367; *Smith* v. *Smith*, 13 Gray, 209.

[2] Gen. St. c. 107, § 55.

[3] *Sewall* v. *Sewall*, 122 Mass. 156.

EFFECT OF AN ABSOLUTE DIVORCE.

Persons divorced will be liable to all the penalties against adultery, if they cohabit as husband and wife, or live together in the same house.[1]

The innocent party may marry again, as if the other party were dead.[2] The guilty party cannot marry again without leave granted by the court,[3] and if he marries without such leave he will be adjudged guilty of polygamy.[4] When a divorce was obtained on the ground of adultery, it was held that proof that the guilty party since the divorce had maintained a good character, and was a fit person to marry, was sufficient to justify the court in allowing her to marry again.[5] But if one, with notice and opportunity to meet the charge, allows a decree of divorce to be obtained against him upon the ground of any condition of mind or body, or religious association, which by law renders him

[1] Gen. St. c. 107, § 24.

[2] Ibid. § 25.

[3] St. 1873, c. 371, § 4; Gen. St. c. 107, § 26.

[4] Gen. St. c. 107, § 25.

[5] *Cochrane, Petr.*, 10 Allen, 276.

unfit for the marriage state, he will not be allowed by the court to marry again without proof that he has changed his condition in this respect.[1] The belief of the guilty party that he has a right to marry again in the lifetime of the other party without leave of court does not render such marriage valid,[2] and such belief would be no defence to an indictment for polygamy.[3]

A person against whom a divorce for adultery has been obtained in another state, by the law of which in such a case both parties may marry again, may contract a valid marriage in this commonwealth, without obtaining leave of the court.[4]

ALLOWANCE *PENDENTE LITE*.

In all cases of libel for divorce, the court may require the husband to pay into court, for the use of the wife during the pendency of the libel, such sum of money as may enable her to maintain or defend the libel, although exceed-

[1] *Child's Case*, 109 Mass. 406.

[2] *White* v. *White*, 105 Mass. 325.

[3] Ibid.; *Com.* v. *Mash*, 7 Met. 472.

[4] *Bullock* v. *Bullock*, 122 Mass. 3.

ing taxable costs; and in every case of libel for divorce the wife, when it is just and equitable, will be entitled to alimony during the pendency of the suit.[1] Under this, the court may order the payment of reasonable counsel fees.[2]

ALIMONY.

When a divorce is granted for any cause, the court granting it may decree alimony to the wife, or any part of her estate to her husband in the nature of alimony.[3] Alimony may be decreed to be paid in one gross sum, or in annual payments, and in determining the amount the court will, of course, consider the pecuniary condition of the husband; the value of his estate and the extent of his liabilities.[4] It may be awarded the wife whether the decree of divorce is in her favor or not.[5]

The court has full power in regard to the

[1] Gen. St. c. 107, § 22.

[2] *Baldwin* v. *Baldwin*, 6 Gray, 341.

[3] St. 1873, c. 371, § 7. See also Gen. St. c. 107, § 43 to 53 incl.; St. 1877, c. 178, § 5.

[4] *Burrows* v. *Purple*, 107 Mass. 428.

[5] *Graves* v. *Graves*, 108 Mass. 314.

matter of alimony, and may in its discretion award it or not. If the question is reopened by a motion to change the form of the allowance, the court will consider any alteration in the circumstances of the parties, and revise the decree accordingly.[1]

The husband is liable for necessaries furnished to his wife during the time she was prosecuting a libel for divorce, notwithstanding a decree of court granting the divorce, and allowing alimony for her past and future expenses.[2]

Upon libels for divorce for any cause, in order to secure compliance with any decree that may be made, an attachment of the husband's real and personal estate may be made by the officer serving the libel.[3] Such attachment may be made by trustee process.[4]

When alimony or other annual allowance is decreed for the wife or children, the court may require sufficient security to be given for its payment according to the terms of the decree; and such decrees (i. e. for allowance or alimony)

[1] *Sparhawk* v. *Sparhawk*, 120 Mass. 390.

[2] *Dowe* v. *Smith*, 11 Allen, 107.

[3] Gen. St. c. 107, § 50; St. 1866, c. 148, § 2.

[4] St. 1866, c. 148, § 3.

may be enforced by the court in the same manner as decrees are enforced in equity.[1]

The conveyance and transfer of his property by the husband, in anticipation of his wife's filing a libel against him for a divorce, and with intent to prevent the execution of any decree for alimony which may be obtained, are a fraud upon her for which she may have redress.[2] In a recent case where such conveyance and transfer were made to the son-in-law and daughter of the respondent, the court held that these facts were competent evidence upon the question whether the husband had in his possession or control the means of obeying the order of the court, and was consequently in contempt for disobedience of that order.[3]

LEGITIMACY OF ISSUE.

A divorce on account of adultery committed by the wife will not affect the legitimacy of the issue of the marriage.[4]

[1] Gen. St. c. 107, §§ 45, 46.
[2] *Burrows* v. *Purple*, 107 Mass. 428.
[3] *Stuart* v. *Stuart*, 123 Mass. 370.
[4] Gen. St. c. 107, § 27.

PROVISIONS CONCERNING PROPERTY.

When a divorce is decreed on account of adultery committed by the husband, or because of his sentence to confinement at hard labor, the wife will be entitled to dower in his lands in the same manner as if he were dead,[1] and upon a decree of divorce for any cause, except adultery committed by the wife, the wife will be entitled to the immediate possession of all her real estate in like manner as if her husband were dead; and the court may make a decree restoring to the wife the whole or any part of the personal estate that has come to the husband by reason of the marriage, or awarding to her the value thereof in money to be paid by the husband.[2]

When the divorce is decreed for the cause of adultery committed by the wife, such decree will not affect her title to her separate real and personal estate during her life, except that the court may decree to the husband so much of her separate real and personal estate as it may deem necessary for the support of the minor children who may have been decreed to his

[1] St. 1870, c. 404, § 4. [2] Gen. St. c. 107, § 40.

custody; but if the wife afterward contracts a lawful marriage, the interest of the divorced husband in the wife's separate real and personal estate, after her death, will cease, except in so much thereof as may have been decreed him as above.[1]

[1] St. 1877, c. 178, § 5.

CHAPTER VI.

CUSTODY OF MINOR CHILDREN.

THE father and mother are the natural guardians of their children so far as custody goes, and as long as they are fit and competent persons they are entitled to said custody.

The Probate Court may appoint a guardian of a minor under fourteen years of age, or if he is over that age he may nominate his own guardian, and the Probate Court will appoint accordingly, if he be such a person as the court approves.[1]

Such a guardian will have the custody and tuition of his ward, and the care and management of his estate until the minor arrives at the age of twenty-one years, *provided* the father and mother are both dead, or are incompetent to transact their own business; but if either the father or mother, or both, are living, and are competent persons, they will be entitled to the custody and tuition of the minor.[2]

[1] Gen. St. c. 109, § 2.

[2] Gen. St. c. 109, § 4.

The father may by will appoint guardians for his children, and such guardians will have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed by the Probate Court.[1]

It will thus be seen that where either of the parents is living, and is a competent person, the duty and power of the guardian is limited to the care and custody of the estate of his ward; but if the parents, or surviving parent, are found to be unfit, a guardian may be appointed who shall have the custody of the child.[2]

In general, the father is by law clearly entitled to the custody of his child, and unless clearly unfit, the court will feel bound to restore the custody to him.[3] So, where there had been a separation between a husband and wife without justifiable cause, the court ordered the child to be taken from the custody of the mother and restored to the father.[4] A writ of *habeas corpus* may be properly issued against a wife to obtain the custody of a child on application of the husband.[5]

Where a husband has deserted or fails to fur-

[1] Gen. St. c. 109, § 5.
[2] St. 1873, c. 367.
[3] *Com.* v. *Briggs*, 16 Pick. 203.
[4] Ibid.
[5] Ibid.

nish suitable support for his wife, or where the wife for a justifiable cause is actually living apart from her husband, the court will, upon application of either the husband or wife, make such order as it deems expedient concerning the care, custody, and maintenance of the minor children.[1]

In the case of a child of tender years, the good of the child is to be regarded as the predominant consideration. There may be cases in which the court would not interfere in favor of a father, to take the child from any safe custody to deliver to him.[2] And if the welfare of the child clearly requires it should remain in the care of the mother, the court will so order.[3]

During the pendency of a libel for divorce, the court will, upon application of either party, make such order concerning the care and custody of the minor children of the parties as shall be deemed expedient, and for the benefit of the children.[4]

[1] Gen. St. c. 107, § 36; St. 1874, c. 205. The statute of 1874 is constitutional, although there is no provision in it for a trial by jury. *Bigelow* v. *Bigelow*, 120 Mass. 320.

[2] *Com.* v. *Briggs*, 16 Pick. 203.

[3] *Com.* v. *Maxwell*, 6 Law Rep. 214.

[4] Gen. St. c. 107, § 32.

When a divorce is decreed for any cause, the court granting it may decree alimony to the wife, and the court has full power to make all such decrees in relation to the care, custody, and support of the minor child or children of the parties, during their minority, as to the court shall seem fit and proper, and for the best interest of such child or children.[1]

After a decree of nullity or divorce the court may make such further decree as it deems expedient concerning the care, custody, and maintenance of the minor children of the parties, and determine with which of the parents the children or any of them shall remain, and may, from time to time, on the petition of either of the parents, revise and alter such decree, and make a new decree, as the circumstances of the parents and the benefit of the children require.[2]

In making an order or decree relative to the custody of children, pending a controversy between their parents, or in regard to their final possession, the rights of the parents in the absence of misconduct shall be held to be equal,

[1] St. 1873, c. 371, § 7. [2] Gen. St. c. 107, § 33.

and the happiness and welfare of the children shall determine the custody or possession.[1]

Where the court has jurisdiction over the custody and maintenance of infant children, if the children are natives of this state, or have resided five years within its limits, they cannot be removed out of the jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court upon cause shown otherwise orders.[2]

If a divorce is decreed in any other state or country, if minor children of the marriage are inhabitants of this state, the court, upon petition of either parent, or of a next friend in behalf of the children, has the same power to make decrees as to their custody and maintenance as if the divorce had been decreed in this state.[3]

[1] Gen. St. c. 107, § 37. [2] Ibid. § 35. [3] Ibid. § 34.

CHAPTER VII.

HOMESTEADS AND SETTLEMENTS.

HOMESTEADS.

EVERY householder having a family is entitled to an estate of homestead, to the extent in value of eight hundred dollars, in the farm or lot of land, with the buildings thereon, owned or rightly possessed by lease or otherwise, and occupied by him as a residence; and such homestead, and all right and title therein, is exempt from attachment, levy on execution, sale for payment of debts, or other purposes, and from the laws of conveyance, descent, and devise.

To constitute such an estate of homestead, and to entitle property to such exemption, it must be set forth in the deed of conveyance by which the property is acquired, that it is designed to be held as a homestead, or after title acquired such design must be declared in writing duly signed, sealed, and acknowledged, and recorded in the registry of deeds for the county or district where such property is situated.

The acquisition of a new estate of homestead will operate to defeat any estate or right of homestead previously existing.[1]

No property by virtue of these provisions is exempt from levy for taxes, or for a debt contracted for the purchase thereof, or for a debt contracted before the deed or writing above referred to is recorded, nor are buildings on land not owned by the householder exempt from sale or levy for the ground-rent of land on which they stand; and such right of homestead will not defeat any mortgage or other encumbrance previously existing.[2]

This estate or right of homestead existing at the death of any householder will continue for the benefit of his widow and minor children, and be held and enjoyed by them, if some one of them occupies the premises, until the youngest child is twenty-one years of age, and until the marriage or death of the widow.[3]

A widow in order to enjoy the benefit of an estate of homestead is not obliged to occupy it personally, but may, if she chooses, let the same to others;[4] and the use of a room in a dwelling-

[1] Gen. St. c. 104, §§ 1, 2.
[2] Ibid. §§ 5, 6.
[3] Ibid. § 12.
[4] *Mercier* v. *Chase*, 11 Allen, 194.

house owned by her husband at the time of his death as a homestead, for the purpose of storing furniture, is a sufficient continuation of occupation by the widow to entitle her to the benefit of the homestead exemption.[1] A right of homestead can only be defeated by a deed acknowledged and recorded, in which the wife of the owner, if he has any, joins for the purpose of releasing the same.[2] If she only releases dower in the deed, she does not lose her homestead.[3] An estate of homestead cannot be affected by the will of the householder.[4]

SETTLEMENT.

By the Act of 1878, c. 190, all former acts concerning the settlement of paupers are repealed. The present act provides that "any woman of the age of twenty-one years, who resides in any place within this state for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place.

[1] *Brettun* v. *Fox*, 100 Mass. 234.

[2] Gen. St. c. 104, § 8.

[3] *Mercier* v. *Chase*, 11 Allen, 194.

[4] *Brettun* v. *Fox*, 100 Mass. 234.

"A married woman shall follow and have the settlement of her husband, if he has any within the state, otherwise her own at the time of the marriage, if she then had any, shall not be lost or suspended by the marriage.

"Legitimate children shall follow and have the settlement of their father, if he has any within the state, until they gain a settlement of their own; but if he has none, they shall in like manner follow the settlement of their mother, if she has any.

"Illegitimate children shall follow and have the settlement of their mother at the time of their birth, if she then has any within the state; but neither legitimate nor illegitimate children shall gain a settlement in the place where they may be born, if neither of their parents then has a settlement therein."

CHAPTER VIII.

WILLS.

A MARRIED woman may make a will of her real and separate personal estate in the same manner as if she were sole, but she cannot by will deprive her husband of more than half her personal property, or of his right to curtesy in her real estate, without his consent in writing.[1]

If a husband assents in writing to a will executed by his wife, unless the assent is qualified or limited, the will is valid and effectual to pass all her real as well as personal estate to the extent to which the devises and bequests therein contained dispose of the property.[2] Such consent to be effectual must be given during the lifetime of the wife.[3]

A married woman may devise the accumulated income as well as the principal of trust funds which she is entitled to receive under a deed or

[1] Gen. St. c. 108, §§ 9, 10.

[2] *Silsby* v. *Bullock*, 10 Allen, 94.

[3] *Smith* v. *Sweet*, 1 Cush. 470.

will, or which have been by her received and invested.[1]

A married woman may, without her husband's consent, make a valid disposition of specific articles of her separate personal property by a *donatio causa mortis* to the extent of depriving him of more than half of her personalty; such disposition not being considered as testamentary, but as a gift.[2]

As a will takes effect from the death of the testator, its validity will depend on the statutes in force at the time of the death, and not at the time it was made.[3]

[1] St. 1864, c. 198 and c. 276.

[2] *Marshall* v. *Berry*, 13 Allen, 43.

[3] *Burroughs* v. *Nutting*, 105 Mass. 228.

CHAPTER IX.

PROVISIONS IN CASE OF INTESTACY.

DISTRIBUTION OF THE PROPERTY OF A MARRIED WOMAN.

If a married woman dies intestate her property will be distributed as follows: —

If the husband survives her, he will be entitled (if a child has been born alive to them) to curtesy, that is, a life interest in all her real estate, or if no child has been born alive, to a life interest in one half her real estate, or, if she leaves no kindred, to the whole of it, and to the whole of her personal property.[1]

The birth of living children after the conveyance by a married woman of land held by her to her sole and separate use will entitle her husband to an estate of curtesy therein.[2]

If her husband does not survive her, her property, both real and personal, will descend

[1] Gen. St. c. 94, § 16; St. 1877, c. 83.

[2] *Comer* v. *Chamberlain*, 6 Allen, 166.

in equal shares to her children, and the issue of any deceased child by right of representation. If there is no surviving child, then to all her other lineal descendants. If she leaves no issue, then in equal shares to her father and mother. If she leaves no issue nor mother, then to her father. If she leaves no issue nor father, then to her mother. If she leaves no issue, and no father nor mother, then to her brothers and sisters, and to the issue of any deceased brother or sister by right of representation. If she leaves no issue, and no father, mother, brother, nor sister, then to her next of kin in equal degree, those claiming through the nearest ancestor being preferred. If she leaves no kindred, then her estate will escheat to the commonwealth.[1]

DISTRIBUTION OF PROPERTY OF HUSBAND.

Upon the death of the husband, if he dies intestate, the widow is entitled to her *dower*, that is, to a life interest in one third of all the real estate of which her husband was seized at any time during coverture, and to which she has not

[1] Gen. St. c. 94, § 16; St. 1876, c. 220.

released her rights.[1] But she can have no dower in wild lands.[2] If the husband leaves no issue, she is entitled to a life interest in one half of the real estate of which he died seized, or to her dower, as she may elect.[3]

Of the personal estate she is entitled, if her husband leaves issue, to one third, or if he leaves no issue, to the whole to the amount of $5,000, and to one half the excess over $10,000.[4]

She is also entitled to her articles of apparel and ornament, to the use of her husband's house and the furniture therein for forty days after his death, and also to such parts of the personal estate as the Probate Court may allow for necessaries, and for provisions for her reasonable sustenance for forty days after her husband's death.[5] And in *Williams* v. *Williams*,[6] Thomas, J., says "the power (i. e. of the Probate Court) is not limited to intestate estates. It is given in all cases, whether there is a will or not, whether

[1] Gen. St. c. 90, § 1.

[2] Ibid. § 12.

[3] Ibid. §§ 15, 16. See *Brigham* v. *Maynard*, 9 Gray, 81.

[4] Gen. St. c. 94, §§ 16, 17.

[5] Gen. St. c. 94, § 16; c. 90, § 18; c. 96, §§ 4, 5.

[6] 5 Gray, 24.

the widow waives the provisions of the will or not."

WAIVER OF PROVISIONS OF HUSBAND'S WILL.

A widow of a testator may, if she so elect, within six months after the probate of her husband's will, file in the Probate Court a waiver of its provisions, and in that case will be entitled to such portion of his real and personal estate as she would have been entitled to if her husband had died intestate; except that if the share of the personal estate to which she would thus become entitled shall exceed the sum of $ 10,000, she will take only the income, during her life, of such excess.[1]

But it seems that in order to be entitled to claim an estate of homestead (see *Homestead*), it is not necessary for the widow to waive the provisions made for her in her husband's will.[2]

A widow will be entitled to dower in addition to the provisions of the will, if it plainly appears by the will that such was the intention of the testator.[3]

[1] St. 1861, c. 164; St. 1871, c. 200; St. 1871, c. 97; St. 1873, c. 58.

[2] *Brettun* v. *Fox*, 100 Mass. 234.

[3] St. 1861, c. 164.

CHAPTER X.

OTHER RIGHTS AND LIABILITIES.

INSURANCE POLICIES.

A POLICY of insurance on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, or a policy of insurance on the life of any person duly assigned, transferred, or made payable to any married woman, or to any person in trust for her or for her benefit, whether such transfer be made by her husband or other person, will inure to her separate use and benefit and that of her children, independently of her husband and his creditors, or of the person effecting or transferring the same, or his creditors. If, however, the premiums on such policies are paid by any person with intent to defraud his creditors, an amount equal to the premiums so paid will inure to the benefit of his creditors.[1]

[1] Gen. St. c. 58, § 62; St. 1864, c. 197.

This provision proceeds upon the theory that the interest of a man's wife and children in his life, and his duty to make reasonable provision for their support, are not wholly subordinate to the claims of his creditors; and that he may make an irrevocable settlement of a policy of insurance on his life for the benefit of his family. The security is declared by the statute to be independent not only of creditors, but of the assured himself.

A policy of life insurance expressed to be for the benefit of the widow and child of the assured, cannot be affected by any assignment thereof by the husband or by his will,[1] nor can the wife make an assignment, even with the assent of her husband and of the insurers, which can affect the right of the child to the amount of the policy upon the death of the husband happening after her death.[2]

If the wife dies before her husband, leaving children, the administrator of her estate will be entitled to receive the amount of the policy after her husband's death, and will hold it, if no

[1] *Gould* v. *Emerson*, 99 Mass. 154; *Unity Ass.* v. *Dugan*, 118 Mass. 219.

[2] *Knickerbocker Life Ins. Co.* v. *Weitz*, 99 Mass. 157.

other trustee is appointed, for the benefit of the children.[1]

In *Burroughs* v. *State Mut. Life Ins. Co.*,[2] it was held that the assignee of a policy expressed to be for the use of the wife and children of the assured, may maintain an action on the policy, notwithstanding there is a surviving child, but such assignee will hold the proceeds, so far as they inure to the benefit of the child, in trust for him.

MARRIED WOMAN MAY BE EXECUTRIX, &C.

A married woman may be an executrix, administratrix, guardian, or trustee, and bind herself and the estate she represents, without her husband joining in any conveyance or instrument whatever, and be bound in the same manner and with the same effect in all respects as if she were sole ;[3] and the marriage of any woman will not extinguish her authority as an executrix, administratrix, guardian, or trustee, but she will continue, notwithstanding such marriage, to hold such trust in all respects in the same man-

[1] *Swan* v. *Snow*, 11 Allen, 224.

[2] 97 Mass. 359.

[3] St. 1874, c. 184, § 4.

ner and with the same effect as if she had remained sole and unmarried.[1]

The widow of an intestate may be appointed administratrix of her husband's estate.[2]

WITNESS IN SUITS TO WHICH HUSBAND IS A PARTY.

The rule of the common law is so far modified by statute in this commonwealth, that a wife is a competent witness in a suit to which her husband is a party, except that she is not allowed to testify as to private conversations with her husband.[3] She cannot, however, be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding against her husband.[4]

A conversation between husband and wife, held in the presence of young children of the family only, who are not shown to have taken any part in, or paid any attention to it, is a private conversation within this statute.[5]

[1] St. 1869, c. 409, § 2.

[2] Gen. St. c. 94, § 1.

[3] St. 1870, c. 393, § 1.

[4] Ibid.

[5] *Jacobs* v. *Hesler*, 113 Mass. 157.

The testimony of a wife as to a transaction between her husband and herself, when no one else is present, is under this statute inadmissible.[1]

In cases within the Statute of Limitations,[2] where the wife of a party to the suit is an attesting witness, she cannot testify, although a competent witness at the time of the trial, if she were not so at the time of the attestation.[3]

A wife is not a competent witness to her husband's will.[4]

RIGHT OF HUSBAND TO CHASTISE WIFE.

Sir William Blackstone in his Commentaries says: "The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children,

[1] *Brown* v. *Wood*, 121 Mass. 137.

[2] Gen. St. c. 155.

[3] *Jenkins* v. *Dawes*, 115 Mass. 599.

[4] *Pease* v. *Allis*, 110 Mass. 157.

for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.* The civil law gave the husband the same or a larger authority over his wife; allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem;* for others, only *modicam castigationem adhibere.* But with us, in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior." [1]

In Massachusetts it is not one of the rights which the man acquires by marriage to strike or beat his wife, even though she be drunk or insolent; and if he do strike her, and death results from the blow, he is guilty of manslaughter at least.[2]

[1] 1 Bl. Com. 444. [2] *Com.* v. *McAfee,* 108 Mass. 458.

Whenever a husband without just cause fails to furnish suitable support for his wife, or has deserted her, or when the wife, for justifiable cause, is actually living apart from her husband, the Supreme Judicial Court may, on the petition of the wife, prohibit the husband from imposing any restraint on her personal liberty.[1]

RIGHT OF HUSBAND TO SERVICES OF WIFE.

The husband has a right to the services of his wife, and is bound to sustain her in sickness and health. Any injury inflicted on her which diminishes the value of this right, or increases the burden of this duty, is a pecuniary loss to him. His only remedy in case of any injury to his wife, or for her seduction, is by an action for the loss of her service and of her comfort and society. The fact that the husband was, at the time of the wife's injury, in the employment of the corporation by whose negligence she was injured, will not be permitted to defeat his claim.[2]

[1] St. 1874, c. 205. See *Bigelow* v. *Bigelow*, 120 Mass. 320.

[2] *Gannon* v. *Housatonic R. R. Co.*, 112 Mass. 234.

CONSTITUTIONAL TO TAX WOMEN.

By the Constitution of Massachusetts, c. 1, § 1, art. 4, the legislature have power to impose taxes "upon all the inhabitants of, and persons resident, and estates lying within, the said commonwealth." By the laws passed by the legislature, in pursuance of this power and authority, a woman is liable to taxation, although she is not qualified to vote for the officers by whom the taxes were assessed.[1]

A WOMAN CANNOT BE A JUSTICE OF THE PEACE.

By the Constitution of the Commonwealth the office of Justice of the Peace is a judicial office, and must be exercised by the officer in person; and a woman, whether married or unmarried, if appointed to such an office, would have no constitutional or legal authority to exercise any of the functions appertaining to it.[2]

[1] *Wheeler* v. *Wall*, 6 Allen, 558.

[2] *Opinion of Justices*, 107 Mass. 604. Miss Strickland, in her Queens of England, Vol. V. p. 278, says that Queen Mary made Lady Berkley a justice of the peace for Gloucestershire, and Lady Rous of the quorum for Suffolk, and that she sat with the other justices at assizes, *cincta gladio*.

A WOMAN MAY SERVE ON THE SCHOOL COMMITTEE.

In 1873 a woman was elected a member of the School Committee of the City of Boston. That body excluded her on the ground that a woman was ineligible to the office. On her petition for a writ of *mandamus*, to compel them to admit her, the court held, without intimating any opinion on the main point, that, as the School Committee were given authority to decide upon all questions relative to the qualifications, elections, and returns of its members, it had no jurisdiction, the action of the committee being final.[1]

In 1874 an act was passed, providing that no person shall be deemed ineligible to serve upon a school committee by reason of sex.[2]

GUARDIAN FOR MARRIED WOMEN.

When a married woman owns property, real or personal, a guardian may be appointed to

[1] *Peabody* v. *School Committee of Boston*, 115 Mass. 383.

[2] St. 1874, c. 389.

her for the same causes and in the same manner as if she were sole. But the husband is entitled to notice before a guardian can be appointed. Such guardian cannot apply the property of his ward to the maintenance of herself and family, while she is married, unless authorized by the Probate Court, on account of the inability of the husband to suitably maintain her or them, or for other sufficient cause. Such a guardian will not have the care, custody, or education of his ward, except in case of the insanity of the husband, or of his abandoning his wife, by absenting himself from the state and making no provision for her.[1]

INSANITY OF HUSBAND OR WIFE.

When a married woman is by reason of insanity incompetent to release her right of dower or homestead, her husband or any suitable person may be appointed guardian for that purpose.[2]

When an insane woman is deserted by her husband, or her husband fails to furnish for her

[1] Gen. St. c. 108, §§ 16, 17, 18.

[2] Ibid. § 19. See *Ante*, p. 56.

a suitable support, or when a wife who is living apart from her husband for any justifiable cause becomes insane, the Supreme Court may, on the petition of the guardian, or next friend of such insane woman, make such order concerning her support and the support of her minor children by said husband as it deems expedient, and the court may from time to time revise and alter such decree as circumstances may require. Upon such petition the property of the husband may be attached in the same manner as upon a libel for divorce.[1]

If the husband is insane and under guardianship, the Probate Court may order an allowance to be paid to the wife out of his estate.[2]

SUPPORT OF WIFE DESERTED BY HUSBAND.

Where a husband has deserted or fails to furnish suitable support for his wife, or where the wife is for a justifiable cause living apart from her husband, the court will, upon application, make such order as it deems expedient concerning the support of the wife.[3]

[1] St. 1878, c. 199.

[2] St. 1862, c. 116.

[3] St. 1874, c. 205.

APPENDIX.

Laws of 1874. Chapter 184.

An Act *in relation to the rights of Husband and Wife. Approved April* 24, 1874.

Sect. 1. A married woman may convey her shares in corporations, and lease and convey her real property, and make contracts oral and written, sealed and unsealed, in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account ; but her separate conveyance of real estate shall be subject to her husband's contingent interest therein, and nothing in this act shall authorize a married woman to convey property to, or make contracts with, her husband.

Sect. 2. When a deed of land is made to a married woman and at the same time she mortgages the same to the grantor to secure the payment of the whole or any part of the purchase-money, or to a third party to obtain the whole or any part of such purchase-money, the seisin of such married woman shall not give her husband any estate by the curtesy as against such mortgagee.

Sect. 3. A married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife.

Sect. 4. A married woman may be an executrix, administratrix, guardian or trustee, and bind herself and the estate she represents without her husband joining in any conveyance or instrument whatever, and be bound in the same manner and with the same effect in all respects as if she were sole.

Sect. 5. The first section of chapter four hundred and nine of the acts of the year eighteen hundred and sixty-nine, and chapter one hundred and sixty-five of the acts of the year eighteen hundred and sixty-three are hereby repealed.

Sect. 6. Nothing in this act shall impair the validity of any antenuptial or post-nuptial settlement.

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